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Supreme Court, U.S.
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No. 10-102

IN THE

Supreme Court of the United States

TINA CONDER,

Petitioner,

v.

RDI/CAESARS RIVERBOAT CASINO, INC.
and M/V GLORY OF ROME,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARIT TO THE
INDIANA COURT OF APPEAL

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1257(a) provides the Supreme Court with jurisdiction over the "vessel status" of an indefinitely moored casino boat where the Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court after the Indiana Court of Appeals ruled on the "vessel status" issue in an earlier appeal, *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. Ct. App. 2008) ("*Caesars I*"), and where, in a later appeal, *Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759 (Ind. Ct. App. 2009) ("*Caesars II*"), in which Plaintiff attempted to improperly again raise the "vessel status" issue, the Indiana Court of Appeals declined to revisit the holding of *Caesars I* and struck the "vessel status" issue from Plaintiff's briefs.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

RDI/Caesars Riverboat Casino, Inc. has two members, Roman Holding Corporation of Indiana (82% ownership) and Harrah's Operating Company, Inc. (18% ownership). No publicly held company owns 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

Facts relevant to this Brief in Opposition were succinctly stated in *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172, 1173-1174 (Ind. Ct. App. 2008)(*Caesars I*):

> Caesars operates a casino (the Casino) on the riverboat M/V Glory of Rome (the Riverboat). The Riverboat is a passenger vessel that is registered with and regularly inspected by the U.S. Coast Guard. It has its own engines and machinery, as well as navigation, lifesaving, and fire-fighting equipment.
>
> In August 2002, the Casino began exclusively conducting dockside gambling pursuant to amendments to Indiana state law that allowed casinos to stop cruising and conduct gaming while dockside. Since that time, the Riverboat has been moored and stationary with the exception of rare tests conducted in compliance with federal regulations. It is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables. Since August 2002, the Riverboat has not transported passengers, cargo, or equipment.
>
> Beginning in March 2002, Conder was employed as a table games dealer in the Casino. On August 19, 2003, and on subsequent occasions, Conder was repeatedly bitten by fleas during the course of her

> employment at the Casino. Treatment for her adverse reaction to the flea bites included large doses of steroids, which allegedly caused her to have a heart attack.
>
> On April 26, 2005, Conder filed a complaint against Caesars, seeking compensation for her injuries based on the Jones Act or, in the alternative, pursuant to Indiana worker's compensation laws as a seaman pro hac vice—a Sieracki seaman. On March 26, 2007, Caesars filed a motion to dismiss the complaint pursuant to *Indiana Trial Rule 12(B)(1)*. On May 15, 2007, Conder filed a motion for partial summary judgment, seeking a declaration as a matter of law that she is a Jones Act Seaman. The [Harrison Circuit Court] held a hearing on the motion to dismiss and the motion for partial summary judgment on October 10, 2007, and on December 4, 2007, the trial court summarily denied Caesars's motion and granted Conder's motion. Caesars now appeals.

On November 25, 2008, the Indiana Court of Appeals issued its decision ("*Caesars I*") in which it found that the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesars's motion to dismiss the Jones Act count of Conder's complaint. The judgment of the trial court was reversed in part and remanded with instructions to dismiss Conder's Jones Act claim with prejudice and for further proceedings relating to the remaining Sieracki seaman claim. 896 N.E.2d at 1181. Conder did

not seek a rehearing of *Caesars I* and filed an untimely Petition to Transfer to the Indiana Supreme Court, which dismissed the belated transfer request and declined to consider it.

In a subsequent appeal (i.e. *Caesars II*), the Indiana Court of Appeals said:

> On March 25, 2009, Caesars filed a motion to dismiss Conder's complaint, including her claims seeking relief under the Jones Act and as a Sieracki seaman. On April 3, 2009, the trial court granted the motion with respect to the Jones Act claims, and on June 1, 2009, the trial court summarily dismissed Conder's remaining claims, including the Sieracki seaman claim. Conder now appeals.

Conder v. RDI/Caesars Riverboat Casino, Inc., 918 N.E.2d 759, 762 (Ind. Ct. App. 2009). *Caesars II* affirmed the trial court's dismissal of the remainder of the case. Plaintiff's Petition to Transfer *Caesars II* to the Indiana Supreme Court was denied on April 15, 2010.

REASONS FOR DENYING THE PETITION

I. As Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court after the Indiana Court of Appeals issued its decision on "vessel status" in *Caesars I*, the "vessel status" issue was not appealed to the highest court of the State of Indiana in which a decision could have been had and therefore, the U.S. Supreme Court lacks jurisdiction over the waived "vessel status" issue under 28 U.S.C. § 1257(a).

The entirety of Plaintiff's Petition for a Writ of Certiorari is dedicated to the sole issue of vessel status. In other words, Plaintiff argues that because the indefinitely moored casino where she worked at the time of her alleged injury should still be considered a vessel in navigation, she is entitled to file suit against her employer as either a Jones Act or Sieracki seaman. However, after the Indiana Court of Appeals ruled against Conder on the vessel status issue back in 2008, she failed to file a timely Petition to Transfer to the Indiana Supreme Court. As a consequence, pursuant to 28 U.S.C. § 1257(a), the U.S. Supreme Court has no jurisdiction to hear the vessel status issue, which is the gravamen of the Petition for Writ of Certiorari.

On November 25, 2008, the Indiana Court of Appeals in *Caesars I* held that the indefinitely moored casino in which the Plaintiff worked was not a vessel in navigation. In this regard, it explained, "we agree with the Seventh Circuit that indefinitely moored dockside casinos are not the kind of vessel that the Jones Act addresses, given the statute's purpose of enhancing legal protections for

seaman regularly exposed to the perils of the sea." *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172, 1179 (Ind. Ct. App. 2008) *citing Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 857 (7th Cir. 2004). *Caesars I* also held, "we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect." 896 N.E.2d at 1181. The Indiana Court of Appeals further ruled that "the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesar's motion to dismiss the Jones Act count of Conder's complaint." *Id. Caesars I* remanded the case with an instruction to dismiss Conder's Jones Act claim. *Id.* at 1173.

Caesars I is dated November 25, 2008. *Id.* at 1172. Under Indiana Rule of Appellate Procedure 57(C)(1), a Petition to Transfer to the Indiana Supreme Court shall be filed no later than thirty (30) days after the adverse decision if rehearing was not sought. Conder did not ask the Indiana Court of Appeals for a rehearing of *Caesars I*. *Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759, 762 (Ind. Ct. App. 2009). Instead, on December 31, 2008, Conder filed both a Petition to Transfer and a verified motion for permission to file a belated Petition to Transfer with the Indiana Supreme Court.

However, in an opinion dated January 5, 2009, the Indiana Supreme Court refused to accept the untimely Petition and further said:

> Appellee, by counsel, files a "Verified Motion For Permission To File Belated Petition To

> Transfer" ("Motion"). The Court of Appeals issued its decision on November 25, 2008, and a rehearing or transfer petition was due on December 29, 2008. Appellee's petition to transfer was tendered on December 31, 2008. The Motion asserts that the petition to transfer was tendered belatedly due to a miscommunication between Appellee's co-counsel. Appellee requests leave to file belatedly her petition to transfer.
>
> The Court appreciates counsel's candid explanation of why Appellee's petition was untimely. However, Appellate Rules 35(C) and 57(C), (D) and (E) provide that no extensions of time will be granted to file a petition to transfer, a brief in response to a petition to transfer, or a reply to a brief in response to a petition to transfer. Given the cause of Appellee's untimeliness was not outside of Appellee's counsel's control, this is not the type of extraordinary circumstances in which the Court might otherwise consider deviating from our unambiguous rules.
>
> Being duly advised, the Court now DENIES the Motion. The Court directs the Clerk to return the tendered petition and all copies to counsel for Appellee.

See also Caesars II, 918 N.E.2d at 762 ("Conder did not seek rehearing [of *Caesars I*] and filed an untimely request for transfer to our Supreme Court, which dismissed the transfer request and declined to consider

it.").[1] Conder also did not seek U.S. Supreme Court review of the Indiana Supreme Court's denial of her motion to file an untimely Petition to Transfer in *Caesars I*.

Under Indiana law, the law of the case doctrine provides that "an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts." *Indiana Farm Gas Prod. Co. v. Southern Ind. Gas and Elec. Co.*, 662 N.E.2d 977, 981 (Ind. Ct. App.1996) *citing Cha v. Warnick*, 476 N.E.2d 109, 114 (Ind. 1985), *reh'g denied*, *cert. denied*, 474 U.S. 920, 106 S. Ct. 249. "The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Id.* "Indiana has applied this doctrine in its strictest sense and has resisted creating exceptions to the strict application of the doctrine." *Id.*

In the Statement of the Case found in Conder's Petition for Writ of Certiorari, Plaintiff makes no mention of either her untimely Petition to Transfer or the Indiana Supreme Court's decision denying Plaintiff's motion to file a belated Petition. This omission from the Statement of the Case amounts to a material misrepresentation. In short, Plaintiff is attempting to obfuscate the fact that her attorneys missed an important deadline and, as a result, failed to satisfy a necessary requirement for obtaining U.S. Supreme

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1. Plaintiff did not include the January 5, 2009 Order of the Indiana Supreme Court in the Appendix attached to her Petition for Writ of Certiorari.

Court review under 28 U.S.C. § 1257(a), which is "obtaining a final judgment from the highest court in which a decision could be had."

Following *Caesars I*, Conder's case continued before the trial court on a different issue not entirely decided by the first appeal. On March 25, 2009, Caesars filed a motion to dismiss the entire case. 918 N.E.2d 759, 762. Then, "on June 1, 2009, the trial court summarily dismissed Conder's remaining claims, including the Sieracki seaman claim." *Id.* Conder then filed a second appeal. *Id.*

On December 31, 2009, the Indiana Court of Appeals issued its decision in *Caesars II*. 918 N.E.2d 759. In its decision, the Indiana Court of Appeals summarized Plaintiff's second appeal as follows, "Conder argues that we should reconsider our opinion in the prior appeal in this matter and that the trial court erroneously dismissed her claim against Caesars based on her alleged status as a Sieracki seaman." *Id.* at 761. *Caesars II* then separately addressed Conder's Jones Act and Sieracki Seaman Claims and affirmed the trial court's dismissal of the case. *Conder*, 918 N.E.2d at 762-763.

However, the entirety of the Indiana Court of Appeals decision in *Caesar II* relative to the vessel status issue consists of the following four sentences:

> I. Jones Act
>
> Conder's primary argument on appeal is that *Caesars I* was incorrectly decided. In support of this position, she makes precisely the same

> arguments she made in the first appeal of this matter. We decline to revisit the holding of *Caesars I*. Additionally, contemporaneously with this opinion, we are entering an order granting Caesars's motion to strike this issue from Conder's briefs and granting Conder's motion to strike the portion of Caesars's appendix including the briefs and appendix filed in *Caesars I*.

Id. at 762. In a pattern that repeats itself, Plaintiff's Statement of the Case does not explain to this Court that in *Caesars II*, the Indiana Court of Appeals struck the vessel status arguments from Conder's briefs as being improperly before that court in the second appeal. Under the law of the case doctrine, the vessel status issue was previously decided in *Caesars I*, a decision that is not before this Court.

In her statement of the basis for jurisdiction in this Court, Plaintiff states that the decision being appealed is the December 31, 2009 judgment of the Indiana Court of Appeals or *Caesars II*. This is false. The vessel status issue was not properly before the Indiana Court of Appeals in *Caesars II*. *Caesars II* refused to reconsider its prior decision and struck Plaintiff's briefs on the issue of vessel status.

Put bluntly, Plaintiff missed her opportunity to appeal the vessel status issue beyond the Indiana Court of Appeals when she failed to file a timely Petition to Transfer to the Indiana Supreme Court following the earlier 2008 decision in *Caesars I*. *See Downes v. Scott*, 45 U.S. 500, 11 L. Ed. 1075 (1846); *Fisher v. Perkins*,

122 U.S. 522, 7 S. Ct. 1227 (1887); and *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901 (1969). Plaintiff cannot circumvent the Indiana Supreme Court's January 5, 2009 decision denying her motion to file a belated Petition to Transfer by wrongly raising the issue for a second time in a subsequent appeal. The mistake that was made over a year and a half ago has consequences and cannot be undone.

Ignoring the clear history of this case before the Indiana courts, Conder files her Petition for Writ of Certiorari as if the issue of vessel status only became final after the Indiana Supreme Court denied Plaintiff's Petition to Transfer following *Caesar II*. This is a grand fiction. Indeed, Plaintiff's Petition for Writ of Certiorari does not even argue that the Indiana Court of Appeals committed any error in *Caesars II* when it not only refused to reconsider *Caesars I* but struck the vessel status issue from Conder's briefs. Thus, there is simply no dispute that the vessel status issue was finally decided in 2008 in *Caesars I*.

The awkwardness of Plaintiff's Petition for Writ of Certiorari is revealed by the fact that nowhere does her argument relative to vessel status even refer to *Caesars II*, the very decision from which she is supposedly seeking U.S. Supreme Court review. Conder does not refer to *Caesars II* in the context of vessel status because other than stating that it was not going to reconsider *Caesars I*, *Caesars II* says nothing about vessel status. To the contrary, the purported split of authority among the federal circuits on the issue of vessel status that is discussed in the Petition for Writ of Certiorari was addressed in *Caesars I* not *Caesars II*.

Instead of expressly stating that she is seeking an appeal of the 2008 decision in *Caesars I*, Conder merely cites to *Caesars I* on page 7 of her Petition for Writ of Certiorari for the proposition that "some courts have held that since the vessels are no longer required to sail they are no longer vessels in navigation." Then, on page 13 of her Petition, Plaintiff states, "the primary issue in this matter was whether or not the GLORY OF ROME was in navigation at the time of Ms. Conder's injury." Accordingly, despite Plaintiff's representation in her statement of the basis for jurisdiction in this Court, the current Petition for Writ of Certiorari regarding *Caesars II* is actually a sleight-of-hand attempt to obtain a review of *Caesars I*.

In her Petition for a Writ of Certiorari, Plaintiff asserts that this Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a), which provides:

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

However, in regard to 28 U.S.C. § 1257(a), this Court has previously explained:

> With 'very rare exceptions,' *Yee v. Escondido, 503 U.S. 519, 533, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992)*, we have adhered to the rule in reviewing state court judgments under *28 U.S.C. § 1257* that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. See *Heath v. Alabama, 474 U.S. 82, 87, 88 L. Ed. 2d 387, 106 S. Ct. 433 (1985)*; *Illinois v. Gates, 462 U.S. 213, 217-219, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983)*; *McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L. Ed. 849, 60 S. Ct. 670 (1940)*. As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987)*, and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb, 451 U.S. 493, 501, 68 L. Ed. 2d*

> *392, 101 S. Ct. 1889 (1981).* We have described in different ways how a petitioner may satisfy this requirement. See *Street v. New York, 394 U.S. 576, 583-585, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969).* In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78, 100 L. Ed. 2d 62, 108 S. Ct. 1645 (1988)* (quoting *Webb, supra, at 501*)), see, *e.g., Exxon Corp. v. Eagerton, 462 U.S. 176, 181, n. 3, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983); Beck v. Washington, 369 U.S. 541, 549-554, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962),* or to persuade us that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, see, *e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-265, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982).* In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L. Ed. 184, 49 S. Ct. 61 (1928); PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980).*

Adams v. Robertson, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029-1030 (1997). *See also Banks*, 395 U.S. at 708:

> Petitioner did not ask the Supreme Court of California to review the judgment entered by

> the Court of Appeal in this case. Therefore, the decision of the Court of Appeal is not a 'final judgment . . . rendered by the highest court of a State in which a decision could be had . . . .' 28 U. S. C. § 1257, and we lack jurisdiction to review it.

Here, the Indiana Supreme Court was silent on the vessel status issue presented by this case. Moreover, Conder makes no effort to establish that the vessel status issue was ever properly presented to the Indiana Supreme Court or that said court was afforded a fair opportunity to address the issue. Instead, the record establishes the exact opposite.

In sum, Plaintiff's motion to file a belated Petition to Transfer following *Caesars I* was denied by the Indiana Supreme Court and, in *Caesars II*, the Indiana Court of Appeals refused to reconsider the vessel status issue and struck arguments on the issue from Plaintiff's briefs. Conder cannot hide from these inconvenient facts. More importantly, she cannot establish that the vessel status issue was raised before the Indiana Supreme Court with either "fair precision and in due time" or "at the time and in the manner required by state law." The fact that Plaintiff's Petition for Writ of Certiorari does not even recount the unfavorable history relative to her untimely Petition to Transfer underscores this point.

Moreover, Conder's Petition for Writ of Certiorari also fails to satisfy U.S. Supreme Court Rule 10(b), which is one of the compelling reasons the Court considers when it is determining whether to exercise its discretion

to review a case on a writ of certiorari. Under Rule 10(b), this Court may grant a writ of certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *See also Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18, 70 S.Ct. 252, 254-55 (1950). Again, in this case, the vessel status issue was not decided by (or even properly presented to) the "state court of last resort" because Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court following *Caesars I*.

Accordingly, in regard to the vessel status issue, this Court is without jurisdiction and the Petition for Writ of Certiorari should be denied.

II. In any event, in addition to the fact that Plaintiff cannot establish jurisdiction, the 2008 *Caesars I* decision relative to vessel status was correctly decided.

If one was only to read the "Reasons for Granting the Petition" found in Plaintiff's Petition for Writ of Certiorari, he or she would not know that *Caesars I* carefully and properly analyzed the impact of *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005) on the vessel status issue in this case. 896 N.E.2d at 1175-1177. Indeed, even a cursory review of *Caesars I* reveals that immediately after acknowledging that "the primary issue in this appeal is whether the Riverboat is a vessel in navigation under the Jones Act," the Indiana Court of Appeals explained that "the United States Supreme Court's most recent

exploration of this issue occurred in *Stewart v. Dutra*." 896 N.E.2d at 1175. Then, *Caesars I* expressly recognized *Stewart's* conclusion that "the term 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 896 N.E.2d at 1175. Accordingly, as *Caesars I* followed *Stewart's* guidance relative to the correct definition of a vessel, it is unclear why the first question presented for review in the Petition for Writ of Certiorari has to do with an alleged need to reaffirm the application of the definition of a vessel found in 1 U.S.C. § 3.

Furthermore, *Caesars I* focused on a key passage in *Stewart* that is directly applicable to this case. In fact, *Caesars I* quoted *Stewart's* holding that "a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." 896 N.E.2d at 1175 *citing* 543 U.S. at 494. Of course, *Stewart* itself cited to *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) for the proposition that a "floating casino was no longer a vessel where it was moored to the shore in a semi-permanent or indefinite manner." 543 U.S. at 494. This Court's reference to *Pavone* in *Stewart* was a pinpoint cite to page 570 of that Fifth Circuit Court of Appeals decision. *Stewart*, 543 U.S. at 494. The central point contained on page 570 of *Pavone* is that "there can be little doubt that indefinitely moored, shore-side, floating casinos . . . must be added to [the list of non-vessels]." 52 F.3d at 570. Accordingly, contrary to Plaintiff's protestations, *Caesars I* not only applied *Stewart* but is entirely consistent with *Stewart*.

Factually, *Caesars I* found that "the Riverboat has been moored to the dock since 2002" and "has had no transportation function since that time." 896 N.E.2d at 1181.[2] It also held that the casino "is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables." *Id.* at 1173. In addition, "it is undisputed that Caesars intended that the Riverboat be moored indefinitely and remain stationary for the foreseeable future." *Id.* at 1180.

Thus, when the Indiana Court of Appeals held in 2008 that "we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect," its finding was well grounded in fact and law. *Caesars I* also cited to numerous prior cases in which similar indefinitely moored dockside casinos were held not to be vessels in navigation for purposes of the Jones Act. *See e.g. Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 857 (7th Cir. 2004)("An indefinitely

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2. On page 15 of her Petition for Writ of Certiorari, Plaintiff asserts, "as evidenced by Ms. Conder's affidavit filed in her opposition to the motion for summary judgment the GLORY OF ROME did, in fact, sail on several occasions subsequent to the implementation of the 'no sailing' legislation." However, no such facts appear in either *Caesars I* or *Caesars II*. Moreover, Caesars never filed a motion for summary judgment in this case. 896 N.E.2d 1172, 918 N.E.2d 759. A review of Plaintiff's Statement of the Case also fails to establish that Caesars ever filed a motion for summary judgment. Furthermore, nowhere in her Petition for Writ of Certiorari does Plaintiff state that she is seeking to appeal any factual findings of the Indiana Court of Appeals.

moored dockside casino with no transportation function or purpose is not a vessel 'in navigation.'); *Earls v. Belterra Resort*, 439 F. Supp. 2d 884, 890 (S.D. Ind. 2006)

> The Miss Belterra, though theoretically capable of being in navigation, was intended to be taken out of navigation by its owner, and was made practically unable to navigate except in emergency situations at the time of the plaintiff's injuries. There is only a remote possibility it will sail again. The Miss Belterra was not a vessel in navigation.

Ford v. Argosy Casino Lawrenceburg, 2008 U.S. Dist. LEXIS 23558 (S.D. Ind. 2008)(Finding that a riverboat casino that is indefinitely moored to the shore is not a vessel in navigation for purposes of the Jones Act.); *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 188 (5th Cir. 2006)("Even after *Stewart*, an indefinitely moored floating casino . . . is not a 'vessel' for purposes of admiralty jurisdiction."); *Martin v. Boyd Gaming Corp.*, 374 F.3d 375 (5th Cir. 2004) (Holding that an indefinitely moored dockside casino that previously cruised was no longer a vessel in navigation under the Jones Act because "the rule has never been once a vessel, always a vessel."); *Wire v. Showboat Marina Casino P'ship*, 2008 U.S. Dist. LEXIS 22044 (N.D. Ill. 2008)(Dockside casino that no longer left the dock was not a vessel in navigation under the Jones Act.); and *Watson v. Ind. Gaming Co. LP*, 337 F. Supp. 2d 951, 955 (E.D. Ky. 2004)("Because the *M/V Argosy VI* has been indefinitely moored and is no longer used, nor intended to be used, for any river transportation function, it is not a 'vessel in navigation' for purposes of the Jones Act.").

III. The 2009 *Caesars II* decision relative to Plaintiff's Sieracki Seaman Claim was also correctly decided.

As explained in *Caesars II*, without the existence of a vessel, Plaintiff's Sieracki seaman claim also fails. 896 N.E.2d at 763. Indeed, the Sieracki seaman doctrine is a theory of recovery based upon a vessel's alleged breach of the warranty of seaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946). In this regard, "the duty to furnish a seaworthy vessel can only attach to a vessel in navigation." *Carter v. Bisso Marine Co.*, 238 F. Supp. 2d 778, 784 (E.D. La. 2002) *citing Roper v. United States*, 368 U.S. 20, 23-24, 82 S.Ct. 5, 7 (1961).

However, in this case, the vessel status issue was decided back in 2008 in *Caesars I*. 896 N.E.2d 1172. *Caesars II* expressly acknowledged, "we have already found in *Caesars I* that an indefinitely moored dockside casino with no transportation function or purpose does not qualify as a vessel in navigation." 918 N.E.2d at 763. *Caesars II* went on to explain that "under these circumstances, we find, likewise, that the Riverboat does not qualify as a 'vessel' for the purposes of a Sieracki claim." *Id.*

In sum, *Caesars I* made the factual findings and legal rulings that form the foundation of the Sieracki seaman decision in *Caesars II*. Under the law of the case doctrine, *Caesars II* was bound to follow the vessel status ruling in *Caesars I*. Accordingly, just like her Jones Act claim, Plaintiff forfeited the right to appeal the vessel status element of her Sieracki seaman claim when she failed to file a timely Petition to Transfer *Caesars I* to the Indiana Supreme Court.

CONCLUSION

Contrary to the assertions of Plaintiff's Petition for Writ of Certiorari, Petitioner is actually seeking a review of the 2008 decision of *Caesars I* not the 2009 decision of *Caesars II*. As the Petitioner failed to file a timely Petition to Transfer to the Indiana Supreme Court following *Caesars I*, the vessel status issue was never the subject of a final judgment or decree rendered by the highest court of the State of Indiana in which a decision could have been had (i.e. the Indiana Supreme Court). Accordingly, Plaintiff's claim that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) is incorrect. In addition and while it is now too late to seek Supreme Court review on the issue, the Indiana Court of Appeals in *Caesars I* correctly decided the issue of vessel status.

Respectfully submitted,

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APPENDIX

APPENDIX A – ORDER OF THE INDIANA SUPREME COURT DATED AND FILED JANUARY 5, 2009

IN THE INDIANA SUPREME COURT

Court of Appeals Cause No. 31A04-0802-CV-40

Trial Court Cause No. 31C01-0504-PL-18

RDI/CAESARS RIVERBOAT CASINO, INC., et al.,

Appellants,

v.

TINA CONDER,

Appellee.

ORDER DENYING MOTION TO FILE BELATED TRANSFER PETITION

Appellee, by counsel, files a "Verified Motion For Permission To File Belated Petition To Transfer" ("Motion"). The Court of Appeals issued its decision on November 25, 2008, and a rehearing or transfer petition was due on December 29, 2008. Appellee's petition to transfer was tendered on December 31, 2008. The Motion asserts that the petition to transfer was tendered belatedly due to a miscommunication between Appellee's co-counsel. Appellee requests leave to file belatedly her petition to transfer.

Appendix A

The Court appreciates counsel's candid explanation of why Appellee's petition was untimely. However, Appellate Rules 35(C) and 57(C), (D) and (E) provide that no extensions of time will be granted to file a petition to transfer, a brief in response to a petition to transfer, or a reply to a brief in response to a petition to transfer. Given the cause of Appellee's untimeliness was not outside of Appellee's counsel's control, this is not the type of extraordinary circumstances in which the Court might otherwise consider deviating from our unambiguous rules.

Being duly advised, the Court now DENIES the Motion. The Court directs the Clerk to return the tendered petition and all copies to counsel for Appellee.

The Clerk is directed to send copies of this order to all counsel of record.

Done at Indianapolis, Indiana, this 5th day of January, 2009

Randall T. Shephard
Chief Justice of Indiana

APPENDIX B — 28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.